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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

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9 Tom Raatz, et al.,

No. CV-16-00170-PHX-DGC

10 Plaintiffs,

ORDER

11 v.

12 Dealer Trade Incorporated,

13 Defendant.

15

16 Plaintiffs Tom Raatz, Marcine Raatz, and TMR LLC filed this action against
17 Defendant Dealer Trade Inc. d/b/a Luxury Motorsports, asserting violation of the Federal
18 Odometer Act (49 U.S.C. § 32701) and breach of contract. Doc. 1. After stipulating to
19 the dismissal of Plaintiffs' Odometer Act claim (Doc. 104), the parties have filed cross-
20 motions for summary judgment on the breach of contract claim. Docs. 114, 116, 119,
21 123. No party requests oral argument. The Court will grant Plaintiffs' motion in part and
22 deny Defendant's motion.

23 **I. Background.**

24 The following facts are undisputed. In the summer of 2015 Plaintiffs were looking
25 to purchase a vehicle for their family. Doc. 115, ¶ 1; Doc. 116 at 2 (stating that
26 Defendant does not contest ¶¶ 1-24 of Doc. 115). Plaintiffs saw Defendant's
27 advertisement for a used 2010 Infiniti QX56 with less than 36,000 miles ("QX56," or
28 "the Vehicle"). Doc. 115, ¶ 2. In August 2015, Plaintiffs traveled from Iowa to Arizona

1 to purchase the Vehicle. *Id.*, ¶ 3. Throughout the sales process, Defendant represented to
2 Plaintiff that the Vehicle had less than 36,000 actual miles. *Id.*, ¶ 4.

3 On August 24, 2015, the parties entered into a Retail Buyer's Order ("RBO"), in
4 which Defendant stated that the Vehicle had 35,648 miles and Plaintiffs agreed to
5 purchase the Vehicle for \$33,359.75. *Id.*, ¶¶ 6-8. The RBO stated that the Vehicle "is
6 sold 'AS IS – NOT EXPRESSLY WARRANTED OR GUARANTEED.'" Doc. 117, ¶ 14; Doc. 120
7 at 1 (stating that Plaintiffs do not dispute ¶¶ 10-15 of Defendant's separate statement of
8 facts (Doc. 117)). Plaintiffs put \$3,000 down, and financed the remaining purchase
9 amount through a credit union. Doc. 115, ¶ 9.

10 Plaintiffs drove the Vehicle back to Iowa and took it to the Willis Infiniti
11 dealership for service. *Id.*, ¶ 10. The dealership informed Plaintiffs that service records
12 showed the Vehicle was serviced approximately four years earlier, on September 29,
13 2011, at which time it had an odometer reading of 46,731 miles. *Id.*, ¶ 11. After learning
14 of the mileage discrepancy, Plaintiffs immediately contacted Defendant. *Id.*, ¶ 14.

15 Between October 6 and October 19, 2015, Plaintiffs reached out to Defendant on
16 four separate occasions – once by telephone and three times by email – seeking a refund
17 of the sales price, but Defendant did not respond. *Id.*, ¶¶ 15-20. Plaintiffs have been
18 forced to pay off their loan with the credit union due to the reduced value of the Vehicle.
19 *Id.*, ¶ 21. Plaintiffs would not have purchased the Vehicle had they known it had more
20 mileage than was reflected by the odometer. *Id.*, ¶¶ 22-23.

21 **II. Legal Standard.**

22 A party seeking summary judgment "bears the initial responsibility of informing
23 the district court of the basis for its motion, and identifying those portions of [the record]
24 which it believes demonstrate the absence of a genuine issue of material fact." *Celotex*
25 *Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Summary judgment is appropriate if the
26 evidence, viewed in the light most favorable to the nonmoving party, shows "that there is
27 no genuine dispute as to any material fact and the movant is entitled to judgment as a
28 matter of law." Fed. R. Civ. P. 56(a). Summary judgment is also appropriate against a

1 party who “fails to make a showing sufficient to establish the existence of an element
2 essential to that party’s case, and on which that party will bear the burden of proof at
3 trial.” *Celotex*, 477 U.S. at 322. Only disputes over facts that might affect the outcome
4 of the suit will preclude the entry of summary judgment, and the disputed evidence must
5 be “such that a reasonable jury could return a verdict for the nonmoving party.”
6 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

7 **III. Plaintiffs’ Motion for Summary Judgment.**

8 Plaintiffs seek summary judgment on their breach of contract claim on the basis of
9 breach of express warranty. Doc. 114 at 5-7. Defendant argues that breach of express
10 warranty was not asserted in Plaintiffs’ complaint and is a separate and distinct claim.
11 Doc. 116 at 1-10. Defendant also argues that the RBO disclaimed any express warranty
12 and that the mileage statement in the RBO did not constitute an express warranty.

13 **A. Adequacy of Plaintiffs’ Complaint.**

14 In their complaint, Plaintiffs plead the following facts:

15 [Defendant] sold the QX56 to Plaintiffs on August 24, 2015.

16 Plaintiffs and [Defendant] signed a contract memorializing the purchase.

17 In the contract, [Defendant] represented that the QX56 had 35,648 original
18 miles.

19 Plaintiffs paid [Defendant] \$30,459.75 to purchase the QX56.

20 Plaintiffs relied upon the affirmative representations of [Defendant] that the
QX56 had 35,648 actual miles in making the decision to buy the QX56.

21 Plaintiffs did not know about the prior mileage history of the QX56.

22 Had Plaintiffs known about the prior mileage history they would not have
23 purchased the QX56.

24 Doc. 1, ¶¶ 18-24. The complaint later alleges that this constituted a breach of contract.

25 *Id.* at 4.

26 Defendant contends that these allegations fail to allege a claim for breach of
27 express warranty because the complaint fails to include: (1) “separate and distinct counts
28 for alleged breaches of express warranty and implied warranty of merchantability, both of

1 which relate to the contract, but do not give rise to a breach of contract claim”; (2) any
2 language referencing the Arizona Uniform Commercial Code, which would govern a
3 breach of express warranty in this instance; and (3) any “averments that [Defendant]
4 warrantied anything, much less the accuracy of the odometer.” Doc. 116 at 7.

5 The Court is not persuaded. Under Arizona law, “[a]ny affirmation of fact or
6 promise made by the seller to the buyer which relates to the goods and becomes part of
7 the basis of the bargain creates an express warranty that the goods shall conform to the
8 affirmation or promise.” A.R.S. § 47-2313(A)(1). The complaint clearly alleges an
9 affirmation of fact (the mileage represented in the contract), in connection with a sale of
10 goods, and facts suggesting that the affirmation became a basis for the bargain (Plaintiffs
11 relied on the mileage representation and would not have entered the contract had they
12 known the mileage was incorrect). The complaint thus pleads the elements of a breach of
13 warranty claim.

14 In Arizona, “[e]xpress warranties are treated like any other contract and
15 interpreted according to general contract principles.” *Chaurasia v. Gen. Motors Corp.*,
16 126 P.3d 165, 169 (Ariz. Ct. App. 2006). The same is true for implied warranties. *Lofts*
17 *at Fillmore Condo. Ass’n v. Reliance Commercial Const., Inc.*, 190 P.3d 733, 734 (Ariz.
18 2008) (“A claim for breach of the implied warranty sounds in contract.”). And Arizona
19 courts repeatedly have held that breach of warranty claims arise out of contract. *Id.* at
20 174 (“Time after time, Arizona courts have held that a claim for breach of warranty does
21 arise out of contract for purposes of A.R.S. § 12–341.01(A.”); *Woodward v. Chirco*
22 *Constr. Co., Inc.*, 687 P.2d 1269, ____ (Ariz. 1984) (holding that claims for breach of
23 implied warranty arise out of contract); *Colberg v. Rellinger*, 770 P.2d 346, ____ (Ariz. Ct.
24 App. 1998) (holding that claims for breach of express warranties sound in contract);
25 *Ponderosa Plaza v. Siplast*, 888 P.2d 1315, ____ (Ariz. Ct. App. 1993) (awarding
26 reasonable attorneys’ fees to the defendant under A.R.S. § 12–341.01(A), finding that
27 any duty to the plaintiff arose out of an express warranty and that a breach of that
28 warranty arises out of contract, not tort). Indeed, this Court has noted that a breach of

1 contract claim can be proved by establishing breach of warranty. *Palmer v. Web Indus.*
2 Inc., No. CV 04-2362-PCT-SMM, 2007 WL 45927, at *7 (D. Ariz. Jan. 8, 2007) (“In
3 order to succeed on her breach of contract claim, Plaintiff must demonstrate that the
4 dealership made an ‘express warranty,’ which was later breached.”).

5 Given these authorities and the fact that Plaintiff pleaded facts which Arizona law
6 would deem a breach of warranty, the Court cannot conclude that Plaintiffs have failed to
7 assert a breach of warranty claim in this case. The Court notes that Defendant does not
8 assert that it was unaware of a breach of warranty claim or was prejudiced by Plaintiffs’
9 failure to expressly label their claim as “breach of warranty.”

10 Defendant argues that each case cited by Plaintiffs in support of their motion
11 expressly included a claim for breach of warranty in the complaint. Doc. 116 at 6-7.
12 While it may be true that parties often plead both breach of contract and breach of
13 warranty claims, Defendant presents no case holding that a claim for breach of warranty
14 is barred if the only claim asserted in the complaint is breach of contract. The Court has
15 found no such authority.

16 **B. Was An Express Warranty Created?**

17 The parties disagree on whether a seller’s representation of the mileage of a
18 vehicle constitutes an express warranty under A.R.S. § 47-2313. An express warranty is
19 created if four elements are met: (1) any affirmation of fact; (2) made by the seller to the
20 buyer; (3) which relates to goods; and (4) becomes part of the basis of the bargain. *Id.*

21 In this instance, it is uncontested that Defendant affirmed to Plaintiffs that the
22 mileage of the vehicle was 35,648. *See* Doc. 115, ¶ 7; Doc. 117, ¶ 1. Similarly, given the
23 basic fact that a vehicle’s value is determined in significant part by the vehicle’s mileage,
24 Defendant’s representation of the Vehicle’s mileage clearly related to the Vehicle. *See*
25 A.R.S. § 47-2313. The only remaining question is whether the Vehicle’s mileage formed
26 a basis of the bargain during the negotiation for sale. *Id.*

27 Plaintiffs’ statement of facts asserts that they drove from Iowa to Arizona to
28 purchase the Vehicle which was advertised as having less than 36,000 miles, Defendant

1 affirmatively represented to them that the Vehicle had 35,642 miles, and Plaintiffs would
2 not have purchased the Vehicle had they known that it had more mileage than Defendant
3 represented. Doc. 115, ¶¶ 3, 7, 22. Defendant admits each of these facts. Doc. 117 at 1-
4 2. These undisputed facts establish that the Vehicle’s mileage was a basis of the bargain.

5 Defendant argues that “although the contract and any documents relating to the
6 purchase of the QX56, reflecting the mileage at 35,648, may be characterized as an
7 affirmation of fact, it does not necessarily give rise to an express warranty.” Doc. 116 at
8 9. In support, Defendant relies on *Roberts v. Robert V. Rohrman, Inc.*, 909 F.Supp. 545,
9 547 (N.D. Ill. 1995). In *Roberts*, the district court found that a dealer’s “repeated
10 representation that the mileage on [a vehicle] at the time of sale was 10,350 was an
11 affirmation of fact but [did] not necessarily give rise to an express warranty” because no
12 evidence had been submitted to show that the inspections reasonably performed by the
13 dealer would have discovered that the odometer was incorrect. *Id.* at 552. Like the
14 dealer in *Roberts*, Defendant argues that it did not create an express warranty because it
15 did not have the capability to verify the accuracy of the odometer, and only represented
16 the actual mileage of the Vehicle “to the best of its knowledge,” as stated in the Secure
17 Odometer Disclosure Defendant presented to Plaintiffs. Doc. 116 at 9.

18 Although no Arizona case the Court could find addresses the issue, other courts
19 have done so. For example, in *Prishwako v. Bob Thomas Ford, Inc.*, 636 A.2d 1383,
20 1390 (Conn. App. Ct. 1994), a Connecticut court considered a similar dispute involving a
21 plaintiff who purchased a used vehicle with an odometer that had been rolled back
22 without the dealer’s knowledge. *Id.* at 1385. The court interpreted Conn. Gen. Stat. Ann.
23 § 42a-2-313 – Connecticut’s analogous version of A.R.S. § 47-2313 – to apply to the
24 dealer, even though it was unaware of the odometer’s inaccuracy. *Id.* at 1390 (“In
25 contracts for the sale of tangible chattels, express warranty encompasses material
26 representations which are false, without regard to the state of mind or the due care of the
27 person making the representation,” and “[i]nnocent misrepresentations . . . are still
28 actionable.”).

1 Connecticut's § 42a-2-313 is virtually identical to Arizona's § 47-2313, and the
2 Court agrees with the *Prishwalko* court's analysis. The Court finds nothing in A.R.S.
3 § 47-2313 that requires the dealer to have knowledge of the odometer's inaccuracy in
4 order to create an express warranty regarding the vehicle's mileage. Accordingly,
5 because Defendant presents no evidence that the mileage of the Vehicle did not form a
6 "basis for the bargain," all four elements of § 47-2313 are met and an express warranty
7 was created. To the contrary, the Arizona statute is broad, covering "[a]ny affirmation of
8 fact or promise made by the seller to the buyer which relates to the goods and becomes
9 part of the basis of the bargain[.]" A.R.S. § 47-2313(A)(1) (emphasis added).

10 **C. The Contract Does Not Limit Express Warranties.**

11 Defendant next argues that "the parties contracted to limit the implied warranties
12 of merchantability . . . and waived all other express and implied warranties." Doc. 116 at
13 7 (citing Doc. 117, ¶¶ 13-14). In response, Plaintiffs concede that the parties agreed to
14 limit the implied warranties of merchantability. Doc. 119 at 6. But Plaintiffs argue that
15 "express warranties, once made, cannot be disclaimed." *Id.* at 3-4 (citing *Epsman v.*
16 *Martin-Landers, LLC*, 2007 WL 2819592, at *1 (W.D. Ark. 2007)).

17 The parties do not cite, and the Court has not found, any Arizona case stating that
18 an express warranty cannot be disclaimed by a contract, but Arizona law clearly disfavors
19 the type of disclaimer used in this case. Specifically, A.R.S. § 47-2316(A) states that
20 "[w]ords or conduct relevant to the creation of an express warranty and words or conduct
21 tending to negate or limit warranty shall be construed wherever reasonable as consistent
22 with each other[,]" and that "negation or limitation [of an express warranty] is inoperative
23 to the extent that such a construction is unreasonable." A.R.S. § 47-2316(A). The
24 U.C.C.'s comment to the model statute from which this language is drawn states that
25 "[t]his section is designed principally to deal with those frequent clauses in sales
26 contracts which seek to exclude 'all warranties, express or implied.' It seeks to protect a
27 buyer from unexpected and unbargained language of disclaimer by denying effect to such
28 language when inconsistent with language of express warranty[.]" U.C.C. § 2-316, cmt.

1 1. The disclaimer language relied on Defendant is contained in fine print at the bottom of
2 the RBO. It clearly was not bargained for and is inconsistent with the express
3 representation, earlier on the same page, that the Vehicle had 35,648 miles. Doc. 115-1
4 at 6.

5 The U.C.C. comment to the provision underlying A.R.S. § 47-2313 also supports
6 this conclusion, stating that “a contract is normally a contract for sale of something
7 describable and described. A clause generally disclaiming ‘all warranties, express or
8 implied’ cannot reduce the seller’s obligation with respect to such description and
9 therefore cannot be given literal effect under § 2-313.” U.C.C. § 2-313, cmt. 4. The
10 RBO clearly included a specific description of the Vehicle has having 35,648 miles.
11 Doc. 115-1 at 6.

12 **D. Summary.**

13 Based on uncontested facts, Plaintiffs have shown that there was an express
14 warranty as to the mileage of the Vehicle, the express warranty was not validly
15 disclaimed in the contract, and the warranty was breached because the mileage was
16 inaccurate. The Court holds on summary judgment that Defendant breached the express
17 mileage warranty in the RBO.

18 Arizona law provides that “[t]he measure of damages for breach of warranty is the
19 difference at the time and place of acceptance between the value of the goods accepted
20 and the value they would have had if they had been as warranted, unless special
21 circumstances show proximate damages of a different amount. In a proper case any
22 incidental and consequential damages under § 47-2715 may also be recovered.” A.R.S.
23 § 47-2714. This case includes a factual dispute regarding the value of the Vehicle on the
24 date it was purchased by Plaintiffs. Plaintiff’s expert opines that the Vehicle had a value
25 of \$16,500 (Doc. 115-1 at 23), while Defendant’s expert disagrees with both the
26 conclusion and the basis of Plaintiff’s expert’s opinion (Doc. 117 at 8-11). Specifically,
27 Defendant’s expert disagrees with the number of actual miles Plaintiffs’ expert “threw
28 out as conceivable,” and with the impact a “Box B” or “Box C” title has on a vehicle’s

1 value. *Id.* Defendant's expert does not, however, provide an opinion as to the precise
2 actual value of the vehicle. *See id.* at 12. Although the absence of a defense opinion on
3 the value of the Vehicle raises questions regarding the utility of a trial in this case (the
4 time for expert disclosures has passed), this dispute between experts precludes summary
5 judgment on the issue of damages.

6 **IV. Defendant's Motion for Summary Judgment.**

7 Defendant argues that Plaintiffs' claims against Defendant must be dismissed
8 because Plaintiffs plead breach of contract, not breach of warranty, and Plaintiffs admit
9 that they have no evidence to support their assertion that Defendant falsely represented
10 the Vehicle's mileage. But, as discussed above, Plaintiffs complaint sufficiently pleads a
11 claim for breach of warranty, and a claim for breach of warranty does not require proof
12 that Defendant knew its mileage representation was false. *See Prishwalko*, 636 A.2d
13 at 1390 (finding that even “[i]nnocent misrepresentations . . . are still actionable.”).
14 Defendant's motion for summary judgment will be denied.

15 **IT IS ORDERED:**

- 16 1. Plaintiffs' motion for summary judgment (Doc. 114) is **granted in part**.
17 2. Defendant's motion for summary judgment (Doc. 116) is **denied**.
18 3. The Court will hold a telephonic hearing on **June 30, 2017 at 2:00 p.m.** to
19 set a date for a trial on damages. Counsel for Plaintiffs shall initiate a
20 conference call to include counsel for all parties and the Court. If a dial-in
21 number is to be used, counsel for Plaintiffs shall provide the dial-in
22 information to all parties and the Court no later than **June 29, 2017 at**
23 **12:00 noon**.

24 Dated this 8th day of June, 2017.

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David G. Campbell
United States District Judge